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IN THE

Supreme Court of the United States

October Term, 1957

No. 141

HOWARD D. ABRAMOWITZ,
Petitioner,

v.

WILBUR M. BRUCKER,
Respondent.

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

I

In his brief to this Court respondent places sole reliance on two jurisdictional issues: first, whether military discharges are subject to review by a United States Court and, second, whether, assuming reviewability, petitioner has suffered injury cognizable in the courts. Respondent evidently concedes that if petitioner has in fact been injured, such injury cannot be legally justified.

We believe it abundantly clear that there is jurisdiction in a United States Court to review the action of the respondent in issuing the discharge here under consideration and, further, that petitioner has been severely injured thereby. In view of respondent's position, it will not be necessary to argue further the constitutional defects in the regulations under consideration.

II

As we understand it, respondent asserts that even when the military is charged with violation of the constitutional or statutory rights of a member of the Armed Forces, a court of the United States has no authority at all to review the action of respondent. To reach this conclusion, respondent argues that Congress has traditionally left the establishment of types of discharge to the military (Res. Br., pp. 22-34); that the Congress has never given the District Courts jurisdiction to review discharges (Res. Br., pp. 34-42); and that "the courts have recognized the limitations upon their authority" (Res. Br., pp. 42-58).

The alleged "recognition" by the courts that they have no such authority is by no means universal. In this very case, for example, the Court of Appeals of the District of Columbia considered and decided the constitutional question on its merits but, inexplicably, refused to consider the statutory question at all (see opinion in *Harmon* case below, 243 F. 2d 613, at 619-622, 627). And as we shall see, the same court, in *Lamb* v. *Patterson*, 154 F. 2d 319 (C. A. D. C., 1946; reversed on other grounds, *Patterson* v. *Lamb*, 329 U. S. 539) held that it *had* jurisdiction to review a discharge. And see also *Levin* v. *Gillespie*, 121 F. Supp. 726 (N. D., Calif., 1954), and *Bernstein* v. *Herren*, 136 F. Supp. 493 (S. D. N. Y., 1955) reversed on other grounds, 234 F. 2d 434 (C. A. 2, 1956).

The right to a judicial review arises, not from any Act of Congress (but see pp. 8, 9, *infra*) but from the constitutional limitations on the power of *any* administrative officer to act in excess of his constitutional and statutory power. If such limitations do restrict the military, they must be enforced by the United States courts, since power to enforce them cannot exist elsewhere in our constitutional scheme. See our original brief, pp. 8-10; see also *Jones* v. *Securities and Exchange Commission*, 298 U. S. 38; *Inter-*

mountain Rate Cases, 234 U. S. 476; *Crowell* v. *Benson*, 285 U. S. 22. The rule is thus stated in the last mentioned case, at pp. 56, 57:

> "• • • The recognition of the utility and convenience of administrative agencies for the investigation and finding of facts within their proper province, and the support of their authorized action, does not require the conclusion that there is no limitation of their use, and that the Congress could completely oust the courts of all determinations of fact by vesting the authority to make them with finality in its own instrumentalities or in the executive department. That would be to sap the judicial power as it exists under the Federal Constitution, and to establish a government of a bureaucratic character alien to our system, wherever fundamental rights depend, as not infrequently they do depend, upon the facts, and finality as to facts becomes in effect finality in law."

III

In support of his contention, respondent places principal reliance on *Patterson* v. *Lamb*, 329 U. S. 539 (Res. Br. p. 42); *United States ex rel. French* v. *Weeks*, 259 U. S. 326, and *United States ex rel. Creary* v. *Weeks*, 259 U. S. 336 (Res. Br., pp. 47, 48); *Orloff* v. *Willoughby*, 345 U. S. 83 (Res. Br., pp. 49 and 50) and *Reaves* v. *Ainsworth*, 219 U. S. 296 (Res. Br., p. 46).

Patterson v. *Lamb*, *supra*, is the only one of the cases cited in which it was argued that a court had no power to review the action of the War Department in fixing the type of discharge and, as the respondent notes (Br., p. 42), this Court expressly reserved that question, deciding the case on other grounds. However, the Court of Appeals in the *Lamb* case held that it had the power to control, by mandamus, the issuance of a discharge certificate. The Government argued there (as it does here) "that it rests in the sound discretion of the Secretary of War

whether to issue a certificate of honorable discharge * * * " (154 F. 2d 319, at 323); the Court of Appeals differed, holding that under the circumstances mandamus would issue to compel the issuance of an honorable discharge.

In view of the action of this Court in reserving the question, the case cannot be claimed as Supreme Court authority for petitioner's position, but certainly it cannot be cited in support of the respondent. Respondent places much reliance (Br., pp. 44-45) on a footnote to this Court's decision in *Patterson;* the cases cited therein merely apply the familiar rule that courts will not interfere with the valid exercise of administrative discretion.

In *United States ex rel. French* v. *Weeks, supra,* and *United States ex rel. Creary* v. *Weeks, supra,* petitioners sought judicial review of a finding, made after full administrative hearing, that petitioners should be discharged "due to [their] neglect, misconduct, and avoidable habits." French claimed that the President had erroneously delegated to the Secretary of War his power to approve such discharges. Creary made the same argument but also claimed that he had been denied a hearing by an administrative appeals board within the Army.

This Court found that the President's power could be delegated to the Secretary of War and that Creary had received a full hearing. The Court said (in *French,* at p. 335) that the action by the military tribunals was "within the scope of the power with which they are invested by law" and (in *Creary,* at p. 343) that "the boards which acted on [Creary's] case did not exceed the powers conferred upon them." These cases have no bearing here, where it is claimed that the military authorities acted in excess of their powers under the Constitution and applicable statute. Furthermore, both French and Creary raised objections only to the procedure followed in their cases; neither objected as does petitioner to the substance of the discharge.

In *Orloff* v. *Willoughby, supra,* question was raised as to the statutory power of the Army to induct the plaintiff under the Doctors Draft Act while at the same time denying him a commission. This Court held that the law did not require that persons inducted under the said Act be granted a commission, and that the granting or withholding of commissions was a matter within the jurisdiction of the military, in the absence of statutory direction. That this holding was merely one of statutory construction is clear from subsequent events. Five months after the decision in *Orloff*, the statute was amended to require the issuance of commissions to persons inducted under the Doctors Draft Act. Act of June 29, 1953, 67 Stat. 86. The Army, in the face of the amended law, still refused to give commissions to doctors whom it considered security risks. In *Nelson* v. *Peckham*, 210 F. 2d 574 (C. A. 4, 1954), the Court of Appeals held that it could review the refusal of the Army to comply with the requirements of the statute and directed that the plaintiff be commissioned or discharged. The government did not appeal. And only a few days ago the final chapter in this story was written when the Court of Claims awarded Dr. Nelson back pay for the period during which he was improperly paid as a non-commissioned soldier. *Nelson* v. *United States*, Ct. Cl. No. 470-56 (December 4, 1957).

In this setting, the *Orloff* case can hardly be cited as authority for the proposition that a court may never review administrative action by the Army; the Court of Appeals for the Fourth Circuit and the Court of Claims obviously think otherwise.

That leaves *Reaves* v. *Ainsworth, supra,* "virtually alone in its harsh grandeur".[1] The *Reaves* case did not involve review of the character of a discharge—indeed, the

[1] Jones, "Jurisdiction of the Federal Courts to Review the Character of Military Administrative Discharges," 57 Col. L. Rev. p. 917, at 962 (November, 1957).

plaintiff there had received an honorable discharge. It does, however, contain the broad language quoted by the respondent and referred to on occasion both by this Court and by lower Federal Courts in subsequent cases. The court there said at p. 305:

> "To those in the military and naval service of the United States, the military law is due process."

We think the decision in the *Reaves* case was a cruel one on its facts and an unwise one on the law. Whatever may have been its validity in the days when the peacetime army of the United States was a small compact unit of professional soldiers, its broad holding should not be applied to the totally different situation in which we find ourselves today. Today our Armed Forces consist of three million men on active duty, and many millions more, like petitioner, in the Reserves. Almost all of this personnel were inducted involuntarily. Almost all of its members leave as soon as their period of service has been concluded. It may be that a professional soldier who voluntarily chooses to spend his life in a military society subject to the military law thereby loses some of the rights which citizens generally possess. It may be doubted, however, whether even under such circumstances a soldier could constitutionally be punished for pre-induction conduct and, indeed, as we pointed out in our original brief (at pp. 34, 35), the Army has traditionally held that a discharge is measured by a man's service record and not by his pre-service record.

But whatever may have been the status in 1910 of the professional army man, the rules applicable to him cannot with justice be applied to the members of a vast citizen army.

The rule urged here would give the Army a degree of censorship over the political activities of all young men prior to their induction. The Army further claims, in cases

now being processed administratively, the right to give undesirable discharges to men in the Inactive Reserves on the basis of their political activity *after* separation from active service.[2] If this position is a valid one, the Army will be able to exert censorship over the political activities of the first thirty years of a man's life. The threat to the civil liberties of the individual and to the integrity of our democracy arising from such a degree of military influence over our political life can hardly be overstated. The evils described in the majority opinions in *Sweezy* v. *New Hampshire*, 254 U. S. 234, 250, 261, appear quite insignificant by comparison.

None of this could have been foreseen by the Court at the time of the *Reaves* decision. As a matter of fact, courts have refused to comply with the hard rule of the *Reaves* case at least as often as they have followed it. See *Burns* v. *Wilson*, 346 U. S. 137; *Shapiro* v. *United States*, 69 F. Supp. 205 (Ct. Cl. 1947); *Lamb* v. *Patterson*, 154 F. 2d 319 (C. A. D. C. 1946); *Nelson* v. *Peckham*, *supra*; *Nelson* v. *United States*, *supra*.

The respondent cites many additional cases, none of which deal with the review of a discharge (except *Gentila* v. *Pace*, 193 F. 2d 924 (C. A. D. C. 1951), cert. den. 342 U. S. 943). Almost all of these cases stand for the familiar proposition that a court will not review the action of an administrative officer within the area of his discretion. This, of course, is not a new principle, nor is it confined to the operation of the military. The cases cited do not bear on the question of whether a court has jurisdiction to determine whether in fact an administrative officer has acted within the bounds of permissible discretion, or in excess of his statutory and constitutional power.

Gentila v. *Pace*, *supra*, was discussed in our original brief, p. 11, footnote 4.

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[2] And, of course, AR 604-10 by its terms applies to men in the Reserves.

IV

The respondent devotes much of his brief to establishing that Congress never gave the District Court jurisdiction to review military discharges. It is more significant that Congress has never expressly denied such jurisdiction to the District Courts. This being so, the courts may exercise their general jurisdiction under 28 U. S. C. 1331, and under D. C. Code Sections 11-305 and 11-306.

There are only two statutes that have any bearing on this matter. The first is the Servicemen's Readjustment Act of 1944, 58 Stat. 286, 38 U. S. C. 693h, which created the Army Discharge Review Board. That statute contains a "finality" clause similar to that discussed by this Court in *Heikkila* v. *Barber*, 345 U. S. 229, 233. It is well settled that a proviso of this kind is ambiguous and inconclusive as regards the availability of judicial review. Even if Congress had intended to preclude judicial review it could not have done so. "Under our system there is no warrant for the view that the judicial power of a competent court can be circumscribed by any legislative arrangement designed to give effect to administrative action going beyond the limits of constitutional authority." *St. Joseph Stockyards Co.* v. *United States*, 298 U. S 38, 52.

The other relevant statute is the Legislative Reorganization Act of 1946 (60 Stat. 812) and its amendment in 1951 (65 Stat. 655). Prior to 1946, Congress had been in the practice of passing private bills to change the character of military discharges. When the Legislative Reorganization Act was passed, Congress created boards for the correction of military records (60 Stat. 837, 5 U. S. C. 191a). As the Attorney General has said, these boards were designed to provide an administrative substitute for the burdensome private bills theretofore considered by Congress (40 Op. Atty. Gen. 504, 506, 508).

Originally the statute contained no finality clause. In 1951 Congress considered amendments to the statute and the bill introduced into the House contained a specific provision barring review "including review by the courts of the United States". (H. R. 1181, 82nd Cong., 1st Session; see Hearings on H. R. 1181 before subcommittee of House Committee on Armed Services, Subcommittee #3, May 3, 1951, p. 353). The House Subcommittee recommended the elimination of the finality clause "so that under appropriate circumstances the courts of the United States might review these matters" (H. R. Rep. No. 449, 82nd Cong., 1st Session, p. 3). This was the result of much concern expressed by members of the subcommittee that rights might be cut off by the bill in its original form (see Hearings on H. R. 1181, *supra*, pp. 369, 377, 391-93, 398). The bill passed both House and Senate; no finality language appears in the final version (5 U. S. C. 191a; recodified as 10 U. S. C. 1552).[3]

Far from indicating a desire to bar judicial review, the legislative history shows a clear Congressional intent to permit the courts to review action of the Board for the Correction of Military Records in refusing petitioner's application. (R. 21)

V

Respondent next argues that petitioner does not present a justiciable case because of his inability to show injury. In our original brief, at pages 13 to 20, we pointed out the extensive injury petitioner has suffered and further noted that the Court has frequently in recent years noted the highly prejudicial effect flowing from government action taken on grounds of doubtful loyalty. We further called the attention of the Court to the form letter sent by the

[3] A complete discussion of the legislative history of this Act is contained in Jones "Jurisdiction of the Federal Courts to Review the Character of Military Administrative Discharges," 57 Col. L. Rev. p. 917, at 967 (November, 1957).

Army to persons against whom charges are made, which concedes that the serviceman who receives an undesirable discharge "may be deprived of many rights as a veteran under both federal and state legislation * * * may expect to encounter substantial prejudice in civilian life * * *" (Pet. Br., p. 17). We noted further the Navy's Regulation to the same effect (footnote 8, p. 17). To this may be added the Air Force Regulations (AFR 39-10), which candidly state:

> "Sec. 8 * * * the type of discharge an airman receives may significantly affect the person's eligibility for benefits under laws administered by the Veterans Administration, eligibility for reenlistment and acceptability for employment in civilian industry. * * *
>
> "[Sec. 8]b. * * * An undesirable * * * discharge may militate severely against an airman in seeking post-service employment, and may render him ineligible for entrance into colleges and other educational institutions."

Respondent ignores all of this and persists in his argument that such discussion about injury in these circumstances is merely "generalizations about deprivations of civil rights" (Res. Br., p. 59). The military has not always spoken in those terms. As we noted in our original brief, at pages 18 to 28, this subject has been discussed by Defense Department representatives on a number of occasions at congressional committee hearings. To the instances cited in our original brief may be added the testimony by Secretary of Defense Wilson before the Senate Committee on Armed Services on March 18, 1954 (Hearings before the Committee on Armed Services, United States Senate, 83rd Congress, Second Sess. on S. 3096). Secretary Wilson presented a chart which appears opposite page 28 of the printed record of the hearings. For the convenience of the Court we have reproduced the chart

as an Appendix hereto. It sets forth an imposing list of benefits to which a veteran with an honorable discharge is entitled. Most of these benefits will accrue to petitioner only after a "review of the facts surrounding the discharge by the agency administering the benefit" (see footnote designated * in the chart which is annexed as Appendix A hereto). These rights include almost all of the important benefits which accrue to a veteran.[4]

It hardly seems necessary to argue that there is a substantial difference between the rights of the holder of an honorable discharge who is entitled to the benefits listed and those of petitioner who must first obtain a favorable exercise of agency discretion, especially when, in the circumstances shown here, there is every reason to believe that such discretion will be exercised in a manner adverse to petitioner.[5]

One additional point should be made. The Workers Defense League has submitted an *amicus* brief in the *Harmon* case which reports the result of a survey providing evidence of what everyone knows, namely, that a less than honorable discharge, given for security reasons, results in very severe economic injury. This injury cannot be dismissed with the casual comment that it is "speculative" or that it arises from "apprehension of lowered community esteem" (Res. Br., p. 59).

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[4] There is annexed to respondent's brief a letter signed by general counsel of the Veterans Administration which appears to contradict the testimony of Secretary Wilson. We have read that letter carefully and cannot see that the statutes and other authorities cited support the conclusions reached.

[5] Respondent makes the additional point that the Veterans Administration has in fact granted benefits to petitioner. This is a bit unfair. The benefits were all granted prior to the undesirable discharge. See Appendix B to Respondent's brief.

VI

Respondent makes much of the "concession" by the petitioner (Pet. Br., p. 25, including footnote 12). We should have thought that the scope of the concession was adequately described by the footnote. We do not know whether, as an original proposition, service in the United States Army is a right, which any able-bodied citizen may enforce by court action, but we do know that the petitioner here is not asserting such right but is prepared to waive it if it exists.

It may be that the security of the nation reasonably requires that the Army have the right to discharge soldiers whom it believes, but cannot prove, to be security risk because of rumor, gossip, suspicion or hunch. It cannot be that the interests of national security require that such persons be publicly stamped as security risks and deprived of valuable rights.

This Court, however, need not decide whether the Army has an absolute right to discharge a soldier; the issue is not raised by this record.

One additional point is made in footnote 52, at page 68 of the respondent's brief, namely, that petitioner does not seek to enjoin the respondent from divulging the grounds for petitioner's discharge to persons who might inquire. We assume that the Army will act in accordance with the decision of this Court and that it will not be necessary to enforce that decree, should it be favorable to the petitioner, by contempt proceedings. If this Court holds that AR 604-10 as applied in this case is illegal and that petitioner is entitled to an honorable discharge without any adverse notation, we assume that the government's records will be corrected accordingly and that no additional injunctive order is necessary.

VII

Petitioner has nothing to add with respect to the constitutional and statutory issues raised by him, in reply to respondent's brief, other than to note one aspect of the legislative history of the Armed Forces Reserve Act of 1952 discussed at pages 28 ff. of the respondent's brief.

Congress did consider the possibility of a discharge for security reasons and no one here denies the right of the Army to discharge persons for security reasons. The issue here is whether such a discharge, based exclusively on lawful pre-induction activity can result in a less than honorable discharge. On this subject the legislative history sheds no light. We should think that had Congress intended to give to the Armed Forces such extraordinary and unprecedented power it would have said so.

CONCLUSION

The decision of the courts below should be reversed.

Respectfully submitted,

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Note

Appendix A, which follows page 13 in this brief is a copy of the page 59 ("Incidents of Discharge"), p. 59 of Docket No. 80.

--Cameraman